

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
APPENDIX**

B
DTS

74-1019

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

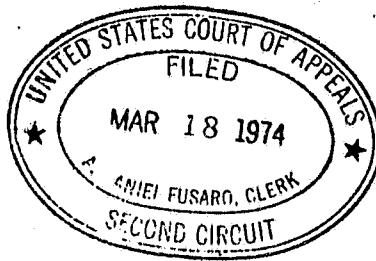
Docket No. 74-1019

BIENVENIDA MARTINEZ,

Appellant.

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
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New York, New York 10007
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PHYLIS SKLOOT BAMBERGER,
Of Counsel

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DATE	PROCEEDINGS	CLERK'S
		PLAINTIFF
12-28-73	Filed JUDGMENT (atty present) It is adjudged that the imposition sentence on counts 1 and 3 is suspended. Deft is placed on probation for a period of TWO (2) YEARS on each of counts 1 and to run concurrently with each other, subject to the standing probation order of this Court. Special conditions of probation that the deft observe all directions given her by the Immigration and Naturalization Service. Counts 2 and 4 are dismissed on of deft's counsel with consent of the Govt. Bonsai, J. 1-4-74 Copies delivered to probation office.	
1-3-74	Filed notice of appeal from judgment dtd 12-28-73. Mailed copies to Legal Aid Society & B. Martinez. Leave to appeal in forma pauperis is granted. Bonsai,	

A TRUE COPY
RAYMOND F. BURCHARDT, CLERK

By R. Jain
Deputy Clerk

W:mc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 CRIM. 842

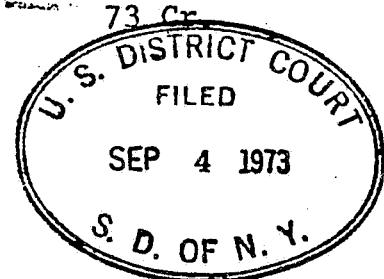
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UNITED STATES OF AMERICA, :

- v -

INDICTMENT

BIENVENIDA MARTINEZ, :

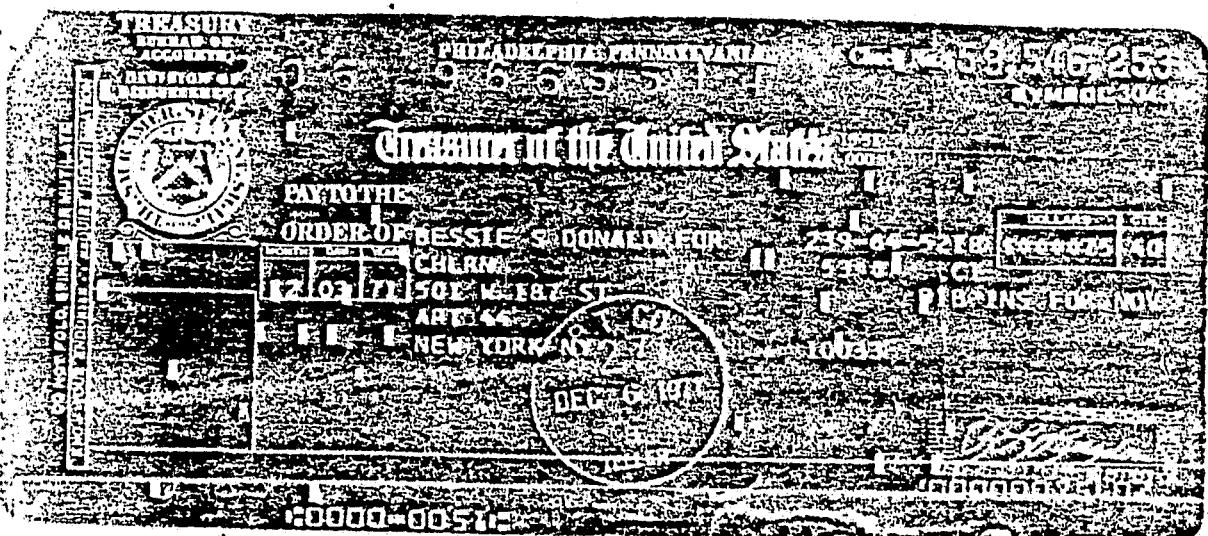
Defendant. :



-----x
COUNT ONE

The Grand Jury charges:

On or about the 3rd day of December, 1971, in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words "BESSIE DONALD", on the back thereof, for the purpose of obtaining from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:



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COUNT TWO

The Grand Jury further charges:

On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true a false, forged and counterfeited writing, namely, the endorsement of the payee on a check knowing the same to be false, forged and counterfeited, the check being that described in the first count of this indictment.

(Title 18, United States Code, Section 495.)

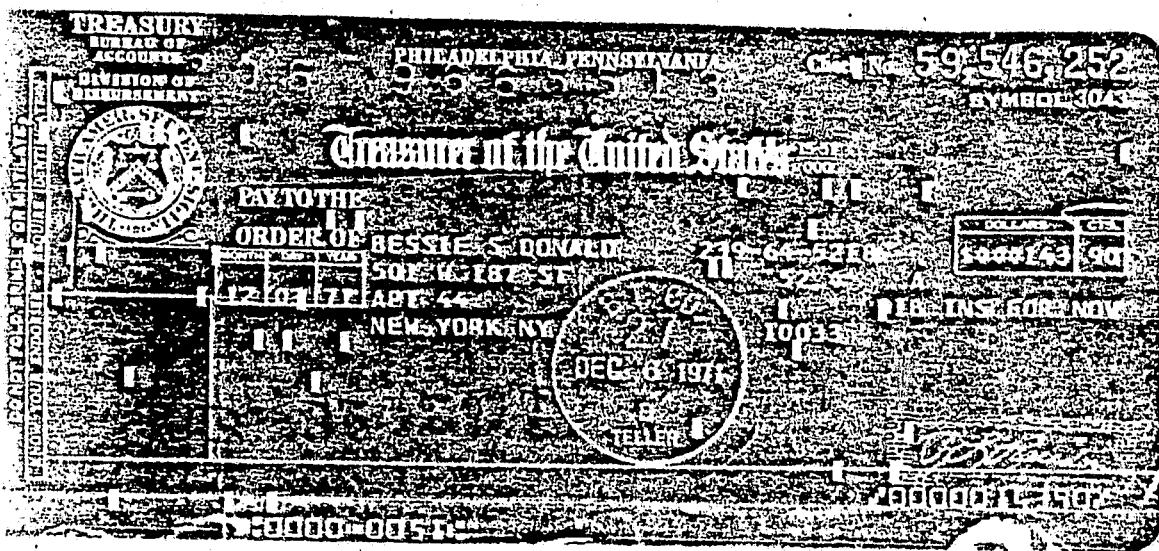
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COUNT THREE

The Grand Jury further charges:

On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly falsely made, forged and counterfeited a writing, namely, the endorsement of the payee on a check, to wit, the words "BESSIE DONALD" on the back thereof, for the purpose of obtaining from the United States and its officers and agents a sum of money, the check being a genuine obligation of the United States, and of the following tenor:



(Title 18, United States Code, Section 495).

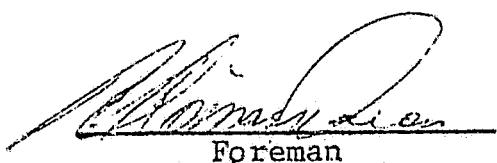
RBH:nc

COUNT FOUR

The Grand Jury further charges:

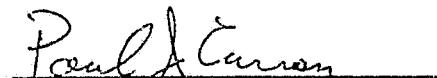
On or about the 3rd day of December, 1971 in the Southern District of New York, BIENVENIDA MARTINEZ, the defendant, unlawfully, wilfully and knowingly and with intent to defraud the United States, uttered and published as true and caused to be uttered and published as true, a false, forged and counterfeited writing, namely, the endorsement of the payee on a check knowing the same to be false, forged and counterfeited, the check being that described in the third count of this indictment.

(Title 18, United States Code, Section 495).

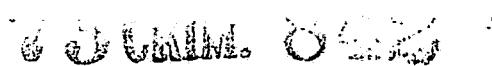


Foreman

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PAUL J. CURRAN
United States Attorney



Form No. USA-33s-274 (Ed. 9-25-58)

United States District Court
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

BIENVENIDA MARTINEZ,

Defendant.

INDICTMENT

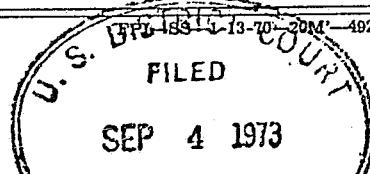
18 U.S.C. §495

PAUL J. CURRAN

United States Attorney

A TRUE BILL

Foreman



18 U.S.C. §495
Deft appears with attorney (F. J. Curran)
Deft pleads not guilty thru interpreter Melvin
Quinones. Case assigned to Judge Bonsal
Deft has 10 days to make any motions.

AD Duffy, J.

NOV 13 1973 TONY EMPANALLO, TRAIL BEGON,
ASSISTANT U.S. ATTORNEY, DEPT. OF LEGAL AID J. CURRY,
COTH SIDES REST, MOTIONS TO DISMISS AND BONSAL J.
JUDGEMENT OF ACQUITTAL DENIED

BONSAL J.

NOV 14 1973 SUMMONS BY COUNSEL CHARGE BY THE
COURT, MARSHAL SWORN, JURY VERDICT DEPT.
GUILTYCTS 1, 3, PRESENTENCE REPORT
APPROVED DEC. 18, 1973 SET FOR SENTENCE
DEPT R. O.R.

BONSAL J.

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DEC 23 1973 SENTENCE BIENVENIDA MARTINEZ
(LEGAL AID J. CURRY, ASSISTANT U.S. ATTORNEY
INTP. MEL. QUINONES PRESENT)

CTS 1, 3, IMPOSITION OF SENTENCE SUSPENDED
DEPT. PLACED ON PROBATION FOR 2 YEARS
ON EACH CT. TO RUN CONCURRENTLY

SPECIAL CONDITIONS DEPT. TO OBSERVE
ALL DIRECTIONS GIVEN HER BY THE IMMIGRATION
AND NATURALIZATION SERVICE OPEN CRIM. 24,
COMMISSED UPON CONSENT OF THE GOVT.
RIGHT TO APPEAL

2 United States of America

3 v.

4 Bienvenida Martinez

73 Cr. 842

11/14/73₄

CHARGE OF THE COURT

5 (Bonsal, J.)

6 ----

7 THE COURT: Madam forelady as you are Miss Marro
8 by virtue of occupying the first chair, and ladies and
9 gentlemen of the jury: First I would like to thank each
10 of you for the attention that you have given during this
11 short trial and to tell you that I appreciate the sacrifices
12 that each of you has been called upon to make in your own
13 private lives so that you could serve in this very important
14 capacity of being on a federal jury.

15 I am sure you will bear with me and give me the
16 same degree of attention that you have shown throughout
17 so that you can understand the principles of law which apply
18 to this case.

19 Remember I told you yesterday when we started
20 that it is your duty here to consider the evidence calmly
21 and dispassionately without any sympathy, without any
22 prejudice, for or against either this defendant, Mrs.
23 Martinez, or the government. I told you that everyone
24 appearing before this bar of justice is entitled to a fair
25 and an impartial trial regardless of his or her occupation or

2
station in life.3
I told you that your verdict must be based solely
4
on the testimony you heard from that witness chair and
5
the exhibits which were received during the course of
6
trial and on nothing else at all.7
In our system of justice, ladies and gentlemen,
8
it is my function to set forth the rules of law which
9
apply here and on this, as I told you, you must accept
10
my instruction. On the other hand, you ladies and gentle-
11
men are the judges of facts, and it is not what a lawyer says
12
a witness testifies to or what a document contains or
13
what it might say on these subjects, what it is you the
14
jury remember and recall.15
I also told you yesterday that during the trial
16
I would have conversations with one or the other of the
17
lawyers. Indeed, I did. I told you then and I repeat
18
now don't pay any attention to those conversations. Above
19
all, don't infer from anything you may have said during
20
this trial that I favor one side or the other in this con-
21
troversy because of course I do not. That is your function,
22
and not mine.23
Throughout my charge, ladies and gentlemen, I
24
will instruct you that you may not convict the defendant,
25
Mrs. Martinez, unless you find that the government has

2 proven each element comprising the crimes charged beyond
3 a reasonable doubt.

4 What do we mean by beyond a reasonable doubt?
5 Well, the words themselves suggest the answer, of course.
6 It is a doubt based on reason, a doubt which a reasonable
7 man or woman might entertain. But a reasonable doubt is not
8 a fanciful doubt, it is not an imagined doubt, it is not a
9 doubt that a juror might conjure up in order to avoid
10 performing an unpleasant task. It is a reasonable doubt,
11 it is a doubt which arises in a juror's mind because of
12 something in the evidence in the case or the absence of
13 evidence in the case, it is the kind of doubt which would
14 cause a reasonable man or woman in a serious and im-
15 portant affair in his or her own life to hesitate to act,
16 and it is the burden of the government to prove the guilt
17 of this defendant beyond a reasonable doubt.

18 The government need not prove the defendant's
19 guilt beyond all possible doubt because if that were
20 the rule few people no matter how guilty they might be
21 would ever be convicted. In this world of ours it is
22 practically impossible for one to be absolutely and com-
23 pletely convinced of any controverted fact which by its
24 nature is not susceptible of mathematical certainty, so
25 the law is that the government must prove that a defendant

2 is guilty beyond a reasonable doubt, not beyond all
3 possible doubt.

4 As I told you yesterday, ladies and gentlemen,
5 the indictment here is merely the charge, the way the
6 government brings into court individuals who it claims
7 have violated the law. The indictment is not evidence of
8 the guilt of Mrs. Martinez, nor does it detract in any
9 degree from the presumption of innocence with which the
10 law surrounds her until her guilt has been proven.

11 This presumption of innocence remains with
12 Mrs. Martinez throughout the trial and applies to each
13 of the essential elements of the crimes charged, and this
14 presumption of innocence remains unless and until you the
15 jury should find that the defendant is guilty beyond a
16 reasonable doubt.

17 Mrs. Martinez has pled not guilty here and by
18 doing so she has put in issue every material allegation
19 in the indictment. As I have told you, the burden is on
20 the government and has remained throughout, to prove each
21 of these elements beyond a reasonable doubt.

22 If the government has not proved this to you
23 then of course it is your duty to find the defendant, Mrs.
24 Martinez, not guilty.

25 This has been a very short trial, ladies and

2 gentlemen , and the evidence has been marshaled for you
3 by the lawyers. I don't intend to review it all again.
4 Of course, it is your recollection that governs and not
5 what they or I might say on these subjects.

6 As I understand it here, the government is con-
7 tending that Mrs. Bienvenida Martinez unlawfully, wilfully
8 and knowingly -- remember those words, unlawfully, wil-
9 fully and knowingly -- endorsed the name Bessie Donald
10 on the back of each of these two government checks, and
11 deposited these checks in a savings account at the Bankers
12 Trust Company intending to defraud the government by ob-
13 taining the money from these checks for herself.

14 The defendant denies this contention and as
15 I understand it she concedes she did sign Bessie Donald
16 on the back of the checks and deposited the checks in her
17 savings account, and she did this to hold the money for the
18 rightful owner. She says she did wrong, I think, but she
19 denies that she had any criminal intent here to commit any
20 crime at all.

21 The indictment here has four counts, ladies and
22 gentlemen, and I will send you a copy of the indictment
23 when I finish my charge. I remind you it is merely the
24 charge and not any evidence against Mrs. Martinez.

25 Counts 1 and 3 of the indictment refer to the

2 signing of Bessie Donald on the back of the checks,
3 and I will take them together. Counts 2 and 4 refer
4 to the depositing of the checks in her account. The legal
5 term is utter. All that means is that she used the checks
6 for her own benefit. So I will call counts 1 and 3
7 the endorsement counts, and counts 2 and 4 I will call
8 the deposit counts.

9 With respect to 1 and 3, the statute involved --
10 1 and 3 being the endorsement counts -- is Section 495
11 of Title 18 of the United States Code, which provides
12 to the extent here relevant that whoever falsely makes, [or]
13 forges any writing on a check for the purpose of obtaining or
14 receiving either directly or indirectly, from the United States
15 any sum of money is guilty of a crime.

16 Here you will recall there are two checks,
17 the first one being in count 1 the \$75 check which was
18 Exhibit 1, and in count 3 is the \$143 which is Exhibit 2.
19 I have left out the cents.

20 With respect to each of these two counts the
21 government must prove beyond a reasonable doubt first that
22 on or about December 3, 1971, the defendant, Mrs. Martinez,
23 wrote the endorsement Bessie Donald, the name of the payee
24 of the check, on the back of the two checks -- that is,
25 she endorsed them.

2 I don't think there is any disagreement about
3 that. Everybody agrees that she did write Bessie Donald's
4 name on them.

5 Second, that the endorsement was a forgery.
6 And all that means from the point of view of this case is
7 that she wrote the name of Bessie Donald without Mrs.
8 Donald's authority. Here again Mrs. Donald testified
9 that she did not authorize anyone to sign her name, and
10 defendant concedes she did sign Bessie Donald's name, of
11 course the defendant does not say she was acting with a
12 criminal intent, that she may have been wrong.

13 The third allegation is that these were genuine
14 obligations of the United States. There is no dispute
15 about that, these were genuine obligations of the United
16 States.

17 The fourth element, finally, is that the endorsement
18 of Bessie Donald made by the defendant on the checks
19 was made with the intent to defraud the United States.

20 All that means here is that the defendant endorsed
21 these checks intending to obtain money from the United
22 States in some way, here of course by depositing the money
23 in her savings account. And here the defendant denies that
24 she intended to defraud the United States, she contends
25 she was doing this to wait for the rightful owner.

2 If the government has not proved these elements
3 beyond a reasonable doubt -- and of course the last element
4 I read to you is the only one in dispute --
5 then of course you should find the defendant not guilty
6 on counts 1 and 3. But on the other hand if you find the
7 government has proved these elements beyond a reasonable
8 doubt then you should find the defendant guilty on counts
9 1 and 3.

10 Turning to counts 2 and 4 of the indictment,
11 they are the deposit counts. All they charge here is that --
12 there is a lot of language in here -- that she deposited,
13 she uttered the checks by depositing them in her own
14 account.

15 As to the statute here, it is the same section
16 as I previously referred to, and it goes on to say "Whoever
17 utters or publishes as true any such forged writing" --
18 that is, whoever utters or publishes as true these checks,
19 such as taking them to the bank and saying Mrs. Bessie
20 Donald's endorsement, put them in my account -- "with
21 intent to defraud the United States, knowing the same
22 to be false, forged or counterfeited," is guilty of a crime.

23 So here on counts 2 and 4, the deposit counts,
24 the government must prove to you beyond a reasonable doubt
25 the following elements.

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2 First, that the endorsement Bessie Donald on
3 each of the two checks was a forgery. I have reviewed
4 that with you in counts 1 and 3.

5 Second, that on or about December 3, 1971, the
6 defendant deposited each of the two checks in her bank
7 account. I think I heard in the summations that that was
8 done on December 6th instead of December 3rd, but that is
9 quite immaterial.

10 And here again I recall that defendant Mrs.
11 Martinez testified that she did deposit the checks in her
12 savings account.

15 And, finally, the fourth element, that the
16 defendant deposited the checks in her savings account
17 intending to defraud the United States. Here again all
18 that means is that she deposited the checks in her savings
19 account because she intended to obtain the use of the
20 money. And this, of course, is in dispute.

Again, if the government has not proven to you each of these elements in counts 2 and 4 you should find the defendant not guilty on those counts. 2 and 4 you should find the defendant not guilty on those counts. If you find that the government has proved each of these counts then

2 you should find the defendant guilty.

3 Going back a minute -- because this is the key
4 element here, conceded so by both sides -- and that is
5 the knowledge of Mrs. Martinez when she did these things,
6 remember I told you that the statute speaks of unlawfully,
7 wilfully and knowingly. In other words, did Mrs.
8 Martinez have the criminal intent here in endorsing Bessie
9 Donald's name on the back of these checks and depositing
10 them in her savings account?

11 This is really the key element here.

12 Well, an act is done knowingly and wilfully
13 if it is done voluntarily and purposely. An act is done
14 wilfully, knowingly and unlawfully if it is done with an
15 evil motive or purpose, such as cheating the government.
16 But an act is not done wilfully, knowingly or unlawfully
17 if it is done by mistake, if it is done by carelessness,
18 or if it is done by other innocent reason.

19 Obviously, we can't look into Mrs. Martinez's
20 mind to prove what she knew and what she intended to do
21 on these occasions. We cannot look into her mind to see
22 what knowledge she had for the purpose of determining
23 her specific intention. But these are matters which
24 you, the jury, must determine from a careful consideration
25 of the facts and circumstances. Knowledge and intentions

2 of a defendant may only be understood and put into the
3 context of the circumstances surrounding her acts and the
4 inferences which you the jury find may be reasonably drawn
5 therefrom.

6 You might ask yourselves whether these trans-
7 actions were normal or abnormal, whether you think the
8 background of the defendant made it likely or unlikely
9 that she fully understood what she was doing, whether you
10 think the defendant had a motive, whether you think she had
11 a financial interest to be served in doing it.

12 These are the kind of questions, ladies and
13 gentlemen, and of course not the only ones, that you should
14 ask yourselves in order to determine the knowledge and
15 intentions of this defendant. Of course, I don't suggest
16 any answers to these questions; in your own daily affairs
17 each of you is continually called upon to use your common
18 sense and experience to determine from the actions and
19 statements of others what their real intentions and purposes
20 are. So please do exactly the same thing here with respect
21 to the knowledge and intentions of Mrs. Martinez.

22 Now, you will recall there was testimony -- I
23 believe it was by Miss Cruz -- that Mrs. Martinez stated
24 to her and a special agent something about receiving
25 a check from a person in Santo Domingo in payment for some

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2 kind of merchandise. You will remember there was some
3 testimony to that effect. And later there was also
4 testimony I think from Miss Cruz that she had told her
5 and the special agent that she had received these checks
6 at the check address where her sister was residing, and
7 I think the defendant said something about this was so.

8 Now, the government contends these statements
9 were false, that she was trying to cover up. Of course,
10 the defendant denies that. But if after considering
11 all of the evidence you find that these statements, or
12 any of them, attributed to the defendant were false
13 then you may consider that statement as circumstantial
14 evidence of a guilty consciousness on the part of the de-
15 fendant, and you may consider it as having probative force
16 on the issue of the defendant's knowledge and intent,
17 which I have just reviewed with you.

18 You heard several witnesses for the government
19 and Mrs. Martinez testify herself, and you, the jury,
20 are the exclusive judges of the credibility of those
21 witnesses. And of course it is the quality of the testimony,
22 the testimony you think represented the true picture of
23 what happened here, and in considering the credibility
24 of these witnesses, ladies and gentlemen, again please
25 use your plain, everyday common sense. You saw the witnesses

2 on the stand. How did they impress you?

3 Did you think they are testifying frankly,
4 candidly, and fairly?

5 So apply your common sense and experience just
6 as you are called upon in determining an important matter
7 in your own lives when you are called upon to decide
8 whether you have been given a true picture of a given
9 situation. I think you would take into account a witness'
10 demeanor, or his background, occupation or business, a witness'
11 candor or lack of it, a witness' possible bias, and you
12 would consider whether a witness has been contradicted
13 or supported by other credible testimony or circumstances.

14 Mrs. Martinez took the stand. She obviously has
15 a vital interest in this case, she is the defendant. And
16 her interest is one of the matters that you should take
17 into consideration in determining the credibility which
18 you give to her testimony. You obviously should consider
19 her testimony with great care. But of course you may
20 conclude that Mrs. Martinez was telling the complete truth
21 to you, despite her interest in the outcome of this trial.

22 If you believe that any witness has been impeached
23 or discredited then it is your exclusive province to give
24 the testimony of that witness such credibility, if any,
25 which you think it deserves. You can accept part of a

2 witness' testimony if you believe it and you can reject
3 the rest of it if you don't believe it.

4 You should also consider the strength or the
5 weakness of a witness' recollection. Sometimes a witness
6 may have a weak recollection on the subject or a witness
7 may be incapable of accurately setting forth what he or she
8 observed or did.

9 As I told you, ladies and gentlemen, there are
10 four counts here, the first two being the endorsement
11 counts, and the other two being the deposit counts. Each
12 of them charges a separate crime, and each count should
13 be considered by you separately. And, of course, the fact
14 that you may find the defendant guilty or not guilty on
15 one count does not control your verdict with respect to
16 the remaining three counts.

17 I will ask -- after you retire I will ask the
18 lawyers to marshal the exhibits which were received
19 during the trial and send them into the jury room so you
20 may have them available in your deliberations. As you
21 deliberate, ladies and gentlemen, please be careful to
22 listen to the views of your fellow jurors as well as to
23 express your own views. A jury deliberation is one in which
24 everybody participates, expresses their views and exchanges
25 views.

2 Don't be afraid to change your original views
3 because of pride of opinion or stubbornness or any other
4 reason should you become convinced that your original
5 view is wrong. But on the other hand, ladies and gentlemen,
6 never surrender your honest and conscientious conviction
7 because of the opinion of your fellow jurors or because you
8 may be outvoted.

9 You will seek to arrive at a verdict here,
10 providing you can do this reasonably and consistently
11 with the conscientious convictions of each and every one
12 of you.

13 Obviously it is important to both the government
14 and to Mrs. Martinez that this case be decided by you,
15 and you understand, of course, that your verdict here,
16 this being a criminal case, must be a unanimous verdict,
17 a verdict joined in by each and every one of you. It is
18 a verdict which reflects each of your conscientious
19 convictions.

20 Should you find that the defendant here is not
21 guilty please do not hesitate for any reason to render
22 a verdict of not guilty. But on the other hand if you find
23 that the law has been violated by the defendant you must
24 not hesitate to render a verdict of guilty because of
25 sympathy or any other reason at all.

2 Please don't consider the question of possible
3 punishment of the defendant should you find the defendant
4 guilty. Please don't let this enter into your deliberations
5 at all. The duty of imposing sentence rests on the court,
6 and you must not allow any consideration of punishment
7 to affect you or make you seek to avoid the performance
8 of an unpleasant task.

9 Finally, I am sure, ladies and gentlemen, that
10 if you listen to the views of your fellow jurors and apply
11 your common sense here you will reach a fair verdict,
12 and remember that that verdict must be rendered without
13 fear, without favor, without prejudice and without
14 sympathy.

15 Will counsel come forward, please?

16 (At the side bar.)

17 THE COURT: Any exceptions or additions?

18 MR. CURLEY: I except to the Court's charge
19 of interest on behalf of the defendant.

20 THE COURT: You have an exception to that.

21 MR. CURLEY: Your Honor, I -- yesterday your Honor
22 stated I could have an exception to the false exculpatory
23 statement charge.

24 THE COURT: I will give you an exception.

25 MR. CURLEY: I wish to amplify at this time,

2 Your Honor, as I understood the Court's explanation
3 was that the government claimed she had made inconsistent
4 or false--

5 THE COURT: No, I didn't say made inconsistent.
6 I said the government contends these statements were false
7 for the purpose of covering her transaction or something
8 to that effect.

9 MR. CURLEY: And that the defendant had disagreed
10 or argues to the contrary. In light of what I consider
11 to be the defense position I would request an instruction
12 that affirmatively the defendant argues that they are
13 not inconsistent, that they were referring to two different
14 checks or two different incidents, the one incident
15 referring to the two checks in the indictment and the other
16 incident referring to the check that was discussed
17 previously with the bank people.

18 THE COURT: All right.

19 MR. TIMBERS: On the false exculpatory statement
20 charge as I understand the charge it presently reads that
21 the government contends that Mrs. Martinez's statements,
22 one, that she received the check from a man from Santo
23 Domingo and two, that she received the check in the mailbox
24 at her own address are incorrect. In fact, it is our position
25 that only the first statement is incorrect.

2 THE COURT: Which is the first, the Santo
3 Domingo.

4 MR. TIMBERS: Right. We have no dispute with the
5 second statement.

6 THE COURT: You have no dispute with the second
7 statement?

8 MR. TIMBERS: Right.

9 THE COURT: I will correct that on the false ex-
10 culpatory statement. I will try to cover both points.

11 Anything else?

12 MR. TIMBERS: Nothing else.

13 THE COURT: I didn't go through reading the
14 indictment because I thought since the only issue was the
15 intent it would only confuse them and waste time.

16 MR. CURLEY: I would object to the government's
17 arguing as to what they think is false. I think that
18 would be an improper suggestion to the jury. They have
19 heard the evidence and they have heard the direct and
20 cross examination.

21 THE COURT: Let me see if I can handle that.

22 MR. CURLEY: My final comment, your Honor, is
23 that I understood that Mr. Timbers to indicate to the
24 jury in his summation that the defendant or the jury could
25 infer that the defendant changed her version of the facts

2 after being advised by an attorney of the consequences,
3 and I objected and I understood the court to say that the
4 jury's recollection will control, but it seems to me that
5 brings in an issue of sympathy, of punishment, and the fact
6 that a lawyer may have told the defendant what to do because
7 of the serious consequences of the crime, and that was
8 the basis of my objection. I thought it was an improper
9 comment and one unwarranted by the evidence in the case.

10 THE COURT: You have an exception on the summation,
11 but not here. All I am worried about is the charge.

12 MR. CURLEY: I am requesting a charge, your Honor,
13 that the Court instruct the jury that there was no evidence
14 in the case of such an argument by counsel and it is im-
15 proper for the jury to consider that comment by the District
16 Attorney.

17 THE COURT: I don't think I will do that. I will
18 give you an exception.

19 MR. CURLEY: Thank you.

20 (End of discussion at the side bar.)

21 (In open court, in the presence of the jury.)

22 THE COURT: Counsel have asked me to -- remember
23 I charged you ladies and gentlemen about the testimony
24 of Miss Cruz, that the defendant had stated to Miss Cruz
25 that she had received checks from a person in Santo Domingo

2 in payment of merchandise. As I understand it there is
3 some confusion but it is your recollection that controls
4 as to whether that referred to these particular two checks
5 or some other check. It is your recollection that controls
6 on that when you consider it.

7 Then again really the point on this thing if
8 you find that this evidence as to these statements is
9 false, and that is the first thing you have to consider,
10 only should you find it false can you consider it as
11 circumstantial evidence of a guilty consciousness on the
12 part of the defendant.

13 I think that covers the point, does it not?

14 MR. CURLEY: Yes, your Honor.

15 MR. TIMBERS: Yes.

16 THE COURT: All right, Mrs. Tokoly, you have
17 served with distinction to this point, and all your fellow
18 jurors have survived to the time of deliberation, so
19 it is my pleasant duty to excuse you, but I want you to
20 realize how important it was that you were here in case
21 somebody had gotten the flu and didn't show up this morning,
22 that would have stopped all the machinery. Thank you
23 very much for coming. What are her instructions?

24 THE CLERK: Please report back to the Central
25 Jury Part.

Certificate of Service

Mar 8, 1974

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Roger Hunt Farley